

CHRISTOPHER DAVENPORT,)
)
 Plaintiff,) No. CV-09-0287-CI
)
 v.) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
 of Social Security,)
)
 Defendant.)
)

JURISDICTION

Plaintiff protectively filed for Supplemental Security Income (SSI) on April 24, 2007. (Tr. 207.) He alleged disability due to degenerative disc disease, stenosis, osteoarthritis and the side effects of medication, with an onset date of August 31, 2003. (Tr. 236.) His claim was denied initially and on reconsideration. (Tr. 75-76.) Plaintiff requested a hearing before an administrative law

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 judge (ALJ), which was held on April 14, 2009, before ALJ R.S.
2 Chester. (Tr. 29-63.) Plaintiff, who was represented by counsel,
3 and medical expert Arthur Brovender, M.D., testified. (Tr. 35-54.)
4 Vocational expert Tom L. Moreland (VE) also testified. (Tr. 54-62.)
5 The ALJ denied benefits on April 21, 2009, and the Appeals Council
6 denied review. (Tr. 9-21, 1-4.) The instant matter is before this
7 court pursuant to 42 U.S.C. § 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 The decision of the Commissioner may be reversed only
12 if it is not supported by substantial evidence or if it is
13 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
14 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a
16 preponderance. *Id.* at 1098. Put another way, substantial
17 evidence is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
20 evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment
22 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
23 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
24 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 Nevertheless, a decision supported by substantial evidence will
2 still be set aside if the proper legal standards were not applied in
3 weighing the evidence and making the decision. *Browner v. Secretary*
4 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
5 there is substantial evidence to support the administrative
6 findings, or if there is conflicting evidence that will support a
7 finding of either disability or non-disability, the finding of the
8 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
9 1230 (9th Cir. 1987).

10 SEQUENTIAL PROCESS

11 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
12 requirements necessary to establish disability:

13 Under the Social Security Act, individuals who are
14 "under a disability" are eligible to receive benefits. 42
15 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
16 medically determinable physical or mental impairment"
17 which prevents one from engaging "in any substantial
18 gainful activity" and is expected to result in death or
19 last "for a continuous period of not less than 12 months."
20 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
21 from "anatomical, physiological, or psychological
22 abnormalities which are demonstrable by medically
23 acceptable clinical and laboratory diagnostic techniques."
24 42 U.S.C. § 423(d)(3). The Act also provides that a
25 claimant will be eligible for benefits only if his
26 impairments "are of such severity that he is not only
27 unable to do his previous work but cannot, considering his
28 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

24 The Commissioner has established a five-step sequential
25 evaluation process for determining whether a person is disabled. 20
26 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
27 137, 140-42 (1987). In steps one through four, the burden of proof

1 rests upon the claimant to establish a prima facie case of
2 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
3 920, 921 (9th Cir. 1971). This burden is met once a claimant
4 establishes that a medically determinable physical or mental
5 impairment prevents him from engaging in his previous occupation.
6 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
7 presentation of 'complete and detailed objective medical reports of
8 his condition from licensed medical professionals.'" *Meanel v.*
9 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)(citation omitted).

10 If a claimant cannot do his past relevant work, the ALJ
11 proceeds to step five, and the burden shifts to the Commissioner to
12 show that (1) the claimant can make an adjustment to other work; and
13 (2) specific jobs exist in the national economy which claimant can
14 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
15 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

16 STATEMENT OF THE CASE

17 The facts of the case are set forth in detail in the transcript
18 of proceedings and are briefly summarized here. At the time of the
19 hearing, Plaintiff was 34 years old with a ninth grade education and
20 a high school graduate equivalency degree. (Tr. 42.) Plaintiff
21 testified he was incarcerated at the time of the hearing on charges
22 of harassment. (Tr. 49.) He explained he had been in and out of
23 prison between 1992 and 2008 for various convictions, including
24 burglary, robbery, DUI and second degree theft. (Tr. 50-51.)
25 During his testimony, he indicated he was married and had a 17-month
26 old daughter. (Tr. 51.) Plaintiff had past work experience as a
27 construction worker, an auto detailer, a concrete mixer, and power
28

1 shovel operator. (Tr. 54-55.) He reported he was injured on the
2 job when he twisted his back "and shattered every disk" he had in
3 his lower back. (Tr. 43.) The record reflects he had three back
4 surgeries after the 2002 accident. (Tr. 476-478.) He also had
5 carpal tunnel surgery in 2006. Plaintiff stated he only could sit
6 for five to ten minutes, stand for three minutes, and walk for one
7 half a block. He testified he could no longer bend or climb stairs
8 and had problems gripping things with his hands as a result of
9 carpal tunnel symptoms. Plaintiff also testified he suffered
10 hepatitis C symptoms, depression and anxiety. (Tr. 44-48.)
11 Plaintiff indicated he was prescribed a back brace and medication
12 for pain and mental problems. (Tr. 47-48.) He also stated he was
13 prescribed a cane which he used when walking. (Tr. 47.)

14 ADMINISTRATIVE DECISION

15 At step one of the sequential evaluation process, the ALJ found
16 Plaintiff had not engaged in substantial gainful activity since
17 April 24, 2007, the application date.¹ (Tr. 11.) At step two, he
18 found Plaintiff had severe impairments of degenerative disc disease
19 of the lumbar spine and status post carpal tunnel release. (*Id.*)
20 He found the following conditions did not cause more than a minimal
21 limitation in Plaintiff's ability to work and were non-severe:
22 hepatitis C, high blood pressure, depression, anxiety, alcohol abuse
23 syndrome, and opiate dependency. (Tr. 12.) At step three, the ALJ

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25 ¹ Under the Social Security regulations, if a claimant meets
26 requirements for eligibility, SSI benefits are not payable until the
27 month following the month the application was filed. 20 C.F.R.
28 § 416.335.

1 found Plaintiff's impairments or combination of impairments did not
2 meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P,
3 Appendix 1 (Listings). Specifically, he considered Listing 1.04
4 (Disorders of the Spine); Listing 14.00 (Immune System Disorders);
5 Listing 4.00 (Cardiovascular); and Listing 11.00 (Neurological).
6 (Tr. 13-14.) At step four, the ALJ determined Plaintiff had the
7 residual functional capacity (RFC) for sedentary level work
8 activities with several non-exertional limitations. (Tr. 14.) He
9 found Plaintiff could occasionally or frequently lift up to 10
10 pounds; stand and/or walk for two hours in a workday with normal
11 breaks; sit for six hours with normal breaks; never climb ladders,
12 ropes, or scaffolds; and occasionally stoop, kneel, crouch, crawl,
13 or climb ramps and stairs. In addition, Plaintiff should avoid
14 concentrated exposure to wetness and vibration and moderate exposure
15 to hazards, unprotected heights, and dangerous machinery. *Id.* The
16 ALJ determined Plaintiff's statements regarding his limitations were
17 not credible to the extent they were inconsistent with the sedentary
18 level RFC. (Tr. 16.) Based on the RFC assessed and the VE's
19 testimony, ALJ Chester found Plaintiff could no longer perform his
20 past relevant work. (Tr. 19.) Proceeding to step five, he found
21 there were other jobs in significant numbers Plaintiff could perform
22 at the sedentary level, which were identified by the VE as amusement
23 park, airport, parking lot, and theater cashier, and electrical,
24 photographic, electronics, and small products assembly jobs. (Tr.
25 20, 56-57.) The ALJ concluded Plaintiff had not been disabled since
26 the application date, and was ineligible for SSI benefits. (Tr. 20-
27 21.)

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when (1) he determined Plaintiff was not disabled under Listing 1.04 at step three; and (2) he failed to properly reject the opinions of treating physician, Dr. Giannantonio Giuliani, that Plaintiff was "severely limited" in his ability to perform work activities. (Ct. Rec. 19 at 19.) He contends Dr. Giuliani's unrejected opinion requires a finding of disability. (*Id.* at 19.)

A. Listing 1.04A.

The Commissioner has promulgated a "Listing of Impairments" that are "so severe that they are irrebuttably presumed disabling, without any specific finding as to the claimant's ability to perform his past relevant work or any other jobs." *Lester v. Chater*, 81 F.3d 821, 828 (9th Cir. 1995). If a claimant's impairment does not meet the criteria specified in the Listings, he or she is still disabled if the impairment equals a listed impairment. 20 C.F.R. § 416.920(d). If a claimant has more than one impairment, the Commissioner must determine whether the combination of impairments is medically equal to any listed impairment. 20 C.F.R. § 416.926(a). A step three finding of disability must be based on medical evidence from acceptable medical sources only, i.e., licensed psychologists or physicians designated by the Commissioner. 20 C.F.R. §§ 416.929(d)(3), .926 (c) and (d). "[L]ongstanding policy requires that the judgment of a physician or psychologist designated

1 by the Commissioner on the issue of equivalence . . . must be
2 received into the record as expert opinion evidence and given
3 appropriate weight." *Social Security Ruling (SSR) 96-6p.*)²

4 Here, the ALJ did not err in finding Plaintiff did not meet or
5 medically equal a Listing under Sections 1.04, 14.00, and 11.00.
6 (Tr. 13.) His step three findings discuss in detail the
7 requirements of each Listing and reference specific evidence in the
8 record to support his step three determination. (Tr. 13-14.)
9 Further, as required by the Commissioner's policy, the ALJ obtained
10 medical expert testimony from Dr. Brovender, whose specialty is
11 orthopedic surgery. (Tr. 33.) Dr. Brovender, who reviewed the
12 entire record, clearly explained the medical reports and imaging
13 results. (Tr. 34-39.) In response to questions by Plaintiff's
14 representative, he discussed in detail why Plaintiff did not meet
15 Listing 1.04A.³ (Tr. 36-39.)

17 ² Social Security Rulings are issued to clarify the
18 Commissioner's regulations and policy. They are not published in
19 the federal register and do not have the force of law. However,
20 under the case law, deference is to be given to the Commissioner's
21 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d
22 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3.
23 (9th Cir. 1991).

24 ³ To meet Listing 1.04A, a claimant must have medical evidence
25 of "nerve root compression characterized by neuro-anatomic
26 distribution of pain, limitation of motion of the spine, motor loss
27 (atrophy with associated muscle weakness or muscle weakness)
28 accompanied by sensory or reflex loss and, if there is involvement

1 Specifically, Dr. Brovender noted Plaintiff did not have
2 atrophy, sensory changes, muscle weakness or reflex changes as
3 required by the Listing. (Tr. 36.) Although Plaintiff's
4 representative presented her theory of why Plaintiff met the
5 Listing, Dr. Brovender rebutted her theory, referencing imaging and
6 medical reports to support his finding that the Listing was not met
7 or equaled. (Tr. 39.) His opinion as a specialist in orthopedic
8 surgery warrants greater weight than a non-specialist. 20 C.F.R. §
9 416.917(d)(5). Further, as found by the ALJ, no other acceptable
10 medical source opined that a Listing was met or equaled. (Tr. 18-
11 19; see, e.g., Tr. 846-47, 906-912, 925.)

12 For example, the record shows agency physician Norman Staley,
13 M.D., reviewed the record in July 2007, and opined Plaintiff was
14 impaired by degenerative disc disease, but was capable of sedentary
15 work. (Tr. 906-12.) Also on July 5, 2007, orthopedic specialist
16 John Shuster, M.D., examined Plaintiff and noted no obvious deficits
17 in motor testing, no pain with straight leg raise or hip range of
18 motion, non-tender iliotibial (IT) bands, normal calf and thigh
19 circumferences (*i.e.*, no atrophy), and unremarkable hip range of
20 motion. (Tr. 924-25.) Dr. Shuster opined Plaintiff's complaints
21 were not explained by imaging reports or physical exam. (Tr. 925.)
22 In addition, as noted by the ALJ, an emergency room report dated
23 July 17, 2007, indicates Plaintiff injured his thigh when he lost
24 control while riding a dirt bike, an activity inconsistent with the
25 level of pain and limitation claimed. (Tr. 17, 927.)

26 _____
27 of the lower back, positive straight-leg raising test (sitting and
28 supine)." 20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.04A.

1 It is noted on independent review that no medical evidence for
2 the period between September 2007 through April 2008, is presented
3 to support a finding of disability under Listing 1.04A. (See Tr.
4 924-28.) In October 2007, Dr. Giuliani reported Plaintiff's back
5 was "doing pretty well." (Tr. 973.) Medical records indicate
6 Plaintiff began treatment for hepatitis C in April 2008, and was
7 incarcerated in Ferry County between August 2008 and January or
8 February 2009. (Tr. 928, 934-57.) Dr. Giuliani's clinic note from
9 February 3, 2009, indicates Plaintiff had been doing laundry jobs in
10 jail, which required lifting that aggravated his back pain. As
11 noted by the ALJ, Dr. Giuliani's February 23, 2009, clinic note
12 indicates Plaintiff reported he had walked over a mile to get to his
13 appointment. (Tr. 17-18, 959.) At the appointment, Dr. Giuliani
14 observed Plaintiff sitting "comfortably, . . . with no major
15 activity or indications of significant pain or discomfort." (*Id.*)
16 He noted muscle spasm in the lower back into the left leg, with a
17 completely normal examination of the upper cervical and lumbar
18 spine, and overuse of prescribed opiates. (Tr. 18, 959, 961.)

19 Plaintiff reiterates the argument presented at the hearing (Ct.
20 Rec. 19 at 14); however, his recitation of medical evidence is
21 insufficient to rebut Dr. Brovender's reasoned opinion that Listing
22 1.04A is neither met nor equaled. 20 C.F.R. §§ 416.929(d)(3), .926
23 (c),(d); SSR 96-6p. Imaging reports, medical observations, and
24 clinic assessments from the entire record support the ALJ's reliance
25 on Dr. Brovender's opinion that Plaintiff did not meet Listing
26 1.04A. Where, as here, Dr. Brovender's assessment of the medical
27 evidence in its entirety is supported by objective imaging and the

1 opinions of other acceptable medical sources in the record, his
2 opinions are substantial evidence to support the ALJ's findings at
3 step three that Plaintiff did not meet or equal a Listing.

4 **B. Dr. Giuliani's Opinions**

5 Plaintiff next argues the ALJ erroneously relied on Dr.
6 Brovender's opinion that Plaintiff was capable of performing
7 sedentary work. He contends Dr. Giuliani's treating physician
8 opinion that Plaintiff was "severely limited"⁴ should have been given
9 greater weight than Dr. Brovender's non-examining opinion that
10 Plaintiff could perform sedentary work. (Ct. Rec. 19 at 18.)

11 A treating physician's opinion is given special weight because
12 he or she is employed to cure and has a greater opportunity to
13 observe the claimant's physical condition over a period of time.
14 *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989); *Murray v.*
15 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). As explained in the
16 Regulations, more weight is given to a medical professional who can
17 provide a detailed, longitudinal picture of a claimant's medical
18 impairment and "bring a unique perspective to the medical evidence
19 that cannot be obtained from the objective medical findings alone."
20 20 C.F.R. § 416.927.

21 If a treating physician's opinion is contradicted, the ALJ may
22 reject it with specific, legitimate reasons that are supported by
23 substantial evidence. *Flaten v. Secretary of Health and Human*
24 *Servs.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605.

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26 ⁴ The form in which this opinion is found defines "severely
27 limited" as "unable to lift at least 2 pounds or unable to stand
28 and/or walk." (Tr. 837.)

1 "The ALJ can meet this burden by setting out a detailed and thorough
2 summary of the facts and conflicting clinical evidence, stating his
3 interpretation thereof, and making findings." *Magallanes v. Bowen*,
4 881 F.2d 747, 751 (9th Cir. 1989)(quoting *Cotton v. Bowen*, 799 F.2d
5 1403, 1408 (9th Cir. 1986). On review, the court can read the
6 adjudicator's summary of the evidence and draw inferences from his
7 or her interpretation of the evidence and findings. *Id.* Rejection
8 of an examining medical source opinion is specific and legitimate
9 where the ALJ's summary of the evidence shows that the medical
10 source's opinion is not supported by his own medical records and/or
11 objective data. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir.
12 2008). The adjudicator need only explain why "significant probative
13 evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393,
14 1395 (9th Cir. 1984).

15 Plaintiff contends the ALJ erroneously rejected Dr. Giuliani's
16 opinions that he is "severely limited" and, if properly credited,
17 the opinions would support a finding of disability. (Ct. Rec. 19 at
18 17-19.)⁵ Plaintiff's argument is unpersuasive. It is noted initially

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20 ⁵ Plaintiff references three evaluations and a 2008 finding by
21 Dr. Giuliani of "severely limited." (Ct. Rec. 19 at 17, referencing
22 Tr. 833, 837 and 841.) However, the record contains only two
23 physical evaluations signed by Dr. Giuliani in which he assessed
24 Plaintiff as "severely limited." One is dated May 12, 2006, about
25 one year prior to Plaintiff's application for SSI. (Tr. 831-34.)
26 The second is dated February 28, 2007, two months before Plaintiff's
27 application for benefits. (Tr. 835-38.) The report at Tr. 839-42 is
28 a duplicate of the February 28, 2007, evaluation.

1 that Dr. Giuliani's evaluation and opinions relate to a period pre-
2 dating Plaintiff's application for SSI benefits (April 24, 2007).
3 Medical opinions that predate the period at issue are of limited
4 relevance. See *Carmickle v. Commissioner, Social Sec. Admin.*, 533
5 F.3d 1155, 1165 (9th Cir. 2008); *Fair*, 885 F.2d at 600. Plaintiff
6 points to no medical evidence that establishes this degree of
7 limitation persisted until or after April 2007. (Tr. 834, 837,
8 139.) Because Dr. Giuliani's pre-application opinions are not
9 significantly probative to the period of disability claimed, the ALJ
10 was not required to explain why little weight was given.

11 Further, assuming the opinions are probative, to warrant
12 controlling weight, a treating medical source opinion must be well-
13 supported and consistent with other medical evidence in the record.
14 20 C.F.R. § 416.927. In any case, an ALJ is not bound by a treating
15 source opinion on the ultimate question of a claimant's ability to
16 perform work-related tasks. *SSR 96-5p (Medical Source Opinions on*
17 *Issues Reserved to the Commissioner)*. A claimant's RFC is not a
18 "medical issue" under the Regulations; it is an administrative
19 finding based on all relevant evidence in the record, not just
20 medical evidence. *Id.*; see also *SSR 96-8p*. The final determination
21 of a claimant's ability to perform work is the province of the ALJ,
22 and no special significance is to be given to a medical source
23 opinion on issues reserved to the Commissioner. 20 C.F.R. §
24 416.927(e); *SSR 96-5p*.

25 Here, the ALJ discussed Dr. Giuliani's medical records and
26 observations in various parts of his decision. (Tr. 16-19.) In his
27 discussion, the ALJ noted inconsistencies between Plaintiff's
28 statements and Dr. Giuliani's observations in 2006 and 2007. (Tr.

1 17-18.) He also noted Dr. Giuliani's reports of Plaintiff's
2 prescribed opiate overuse, possible drug-seeking behavior, and
3 observed capabilities exceeding Plaintiff's allegations. *Id.* In
4 his RFC findings, the ALJ gave little weight to Dr. Giuliani's
5 specific opinions that Plaintiff's overall work level was "severely
6 limited," noting that in both reports Dr. Giuliani advised a re-
7 evaluation of Plaintiff's work level after two months. (Tr. 19,
8 833, 834, 838.) In addition, the ALJ found that even if Plaintiff
9 were "severely limited" in February 2007, the evidence indicates he
10 still had the capacity to do a wide range of sedentary work "the
11 majority of the time." (Tr. 19.)

12 The court can infer reasonably from the ALJ's decision that Dr.
13 Giuliani's unexplained opinion that Plaintiff was "severely limited"
14 in February 2007, was not given significant weight because it
15 predated Plaintiff's claim for SSI, it was inconsistent with Dr.
16 Giuliani's longitudinal clinic notes, the reports from medical
17 specialists, the objective medical evidence, the opinions of
18 reviewing medical experts, and Plaintiff's self-reported activities,
19 all of which were discussed in the ALJ's decision. In addition, as
20 stated by the ALJ, even if Plaintiff were severely limited from May
21 2006 until February 2007, the evidence in its entirety supports the
22 administrative finding that Plaintiff was capable of a wide range of
23 sedentary work after April 24, 2007, his date of application for SSI
24 benefits. (Tr. 18.)

25 The final determination regarding a claimant's ability to
26 perform basic work is the sole responsibility of the Commissioner.
27 20 C.F.R. § 416.946; SSR 96-5p. Although Dr. Giuliani concluded
28 Plaintiff was "severely limited," in February 2007, he did not opine

1 Plaintiff was unable to perform any work during the relevant period.
2 Because the ALJ is not required to explain the weight given non-
3 probative evidence, any error in the ALJ's evaluation of Dr.
4 Giuliani's opinions dated May 2006 and February 2007 is harmless.
5 *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th
6 Cir. 2006). Because the ALJ's reasoning is a rational interpretation
7 of the record and supported by substantial evidence, his findings
8 may not be disturbed. Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is
11 **DENIED;**

12 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 23**) is
13 **GRANTED;**

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. The file
16 shall be closed and judgment entered for Defendant.

17 DATED March 7, 2011.

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19 S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE
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